

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska) Application No. PI-83
Public Service Commission, on)
its own motion, to investigate) ORDER RECOMMENDING
the feasibility and propriety of) LEGISLATION.
the regulation of wireless)
carriers.)
)
) Entered: October 13, 2004

BY THE COMMISSION:

On July 7, 2004, the Nebraska Public Service Commission (Commission) opened the above-captioned docket, on its own motion, to investigate the feasibility and propriety of the regulation of wireless carriers in Nebraska.

Consistent with Legislative Resolutions LR 264 and LR 309, the Commission solicited input regarding issues related to wireless service including:

1. Billing practices of wireless carriers;
2. Advertising including, but not limited to special promotions, service contracts, and product information;
3. Service quality of wireless carriers; and
4. Impact of number portability by wireless carriers on the need for regulation.

Written comments were received from several individuals, representatives from municipalities, and from industry. The Commission also solicited comment during a series of public meetings in Omaha, Lincoln, North Platte, McCook, Fremont, Grand Island, Norfolk, and Scottsbluff.

A hearing on this matter was held on September 23, 2004. All written comments received from the public and industry, a transcript of the public meetings, and an executive summary from Commission staff with additional information were entered into the record.

O P I N I O N A N D F I N D I N G S

The Commission currently receives complaints from consumers regarding wireless carriers and service, and attempts to resolve those complaints with the carriers, although it has no statutory authority to do so. The Commission began tracking consumer complaints related to wireless in the fiscal year 2001-2002. The wireless complaints received now make up one-third (32.2 percent) of all complaints received from both wireless and

wireline customers. The Commission considers this significant in light of the fact that it lacks any statutory authority to receive these complaints. In addition, consumers are not notified that they may contact the Commission regarding complaints.

The complaints received by the Commission most frequently relate to billing, service, and customer service. From July 2004, to September 22, 2004, the Commission logged 134 wireless complaints, including 68 regarding billing, 58 regarding service, and 5 regarding customer service.

These complaints mirror the written comments received and testimony taken during public meetings in this docket. Many of the comments describe multiple and overlapping issues, including billing issues related to roaming charges, being enrolled for incorrect plans, and being billed for dropped calls. Others complain of poor customer service and responses to questions and concerns regarding billing issues and threats of being referred to collection agencies.

Industry representatives have asserted that increased state regulation would impede the growth of the industry, stifle innovation, and increase costs to consumers. They have further commented that avenues to address consumer concerns are already available through state attorneys general, the Federal Communications Commission (FCC), and existing consumer protection laws. However, the industry has not put forth evidence concerning the costs to consumers choosing to pursue these avenues.

The Commission finds that requiring consumers to seek redress from the FCC or the Attorney General's office for individual billing or service agreement disputes is overly burdensome. Many consumers would likely choose to forgo taking any action due to the costs, inconvenience, and complexities often associated with federal agencies. A state commission with the technical expertise and existing relationships with carriers is also better equipped to mediate individual consumer disputes.

Other states have already sought some regulatory control with respect to wireless carriers. In January 2003, National Association of Regulatory Utility Commissioners (NARUC) conducted a state survey regarding the regulation of wireless services.¹ Of the 50 states surveyed, 35 responded. Fourteen indicated that they had some level of regulation. Connecticut, Hawaii, Vermont and California indicated that they regulated the terms and conditions of wireless service. Other areas of

¹ A copy of a summary of survey results is attached hereto as Exhibit A.

regulation included service quality, billing, and customer service. The remaining states indicated no regulation. NARUC also questioned the nature of the problems relating to wireless telecommunications reported in the individual states. These included service quality, billing, contract issues, number pooling, tower siting, marketing practices, terminating compensation, dropped calls, E-911 issues, disregarding calling practices, consumer complaints, lack of response to complaints, customer service, blocking cellular service, interconnection agreements, reciprocal compensation, misquoted rates, and early termination fees.

No evidence was presented by industry during our hearing that would indicate that the limited regulation imposed in some states has impeded the growth of the industry or lead to significant increased costs to consumers.

Based upon the above, the Commission finds that the need to provide an easily accessible forum for consumers to resolve issues with their wireless carriers in a cost effective manner justifies legislation authorizing limited regulatory authority over wireless carriers in Nebraska. Any proposed legislation must fall within the scope of state authority to regulate wireless carriers as set forth in the Telecommunications Act of 1996.

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.²

Industry representatives have stated that preemption of state authority is broad, leaving little room for states to act. However, courts have found that state law is not completely preempted in cases involving recovery of late fee charges,³ billing language related to and restitution of amounts collected for directory assistance ⁴,and liquidated damages provisions for

² 47 U.S.C. § 332(c)(3)(A).

³ *Brown v. Washington/Baltimore Cellular, Inc. et al.*, 109 F.Supp.2d 421, 423 (D. Md. 2000).

⁴ *Russell, et al. v. Sprint Corp., et al.*, 264 F.Supp.2d 955 (D.Kan. 2003) holding that class action suit seeking restitution, declaratory relief and injunctive relief related to charges and billing for directory assistance calls were not completely preempted by § 332(c)(3)(A) and that removal was not required of said claims under the substantial federal question doctrine as the claims were based upon misrepresentation, a state claim.

early termination of service agreement.⁵ "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." ⁶

Based upon the information received, the Commission finds that legislation which grants jurisdiction to the Commission to assist in the resolution of billing and service agreement disputes between consumers and their wireless carriers would be in the public interest.

Such legislation should allow a consumer an opportunity for a hearing and provide the Commission with fining authority. However, the legislation should grant the Commission more narrow regulatory authority than that currently exercised with respect to wireline carriers.

The Commission has a long history of resolving disputes with carriers in a cooperative manner and does not seek to abandon that practice. We recognize the industry's efforts to cooperate with the Commission in resolving consumer complaints informally. The Commission simply seeks a vehicle by which it may assist consumers in resolving disputes if an impasse occurs and to provide an independent body to resolve differences in a less costly and time consuming manner than is currently available. The legislation recommended herein seeks to validate the Commission's current efforts to assist consumers with respect to the terms and conditions of their wireless service.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Commission staff draft proposed legislation consistent with this order for submission to the Transportation and Telecommunications Committee's consideration.

IT IS FURTHER ORDERED that the proposed legislation shall provide the Commission with the authority to resolve disputes between consumers and wireless carriers regarding billing and

⁵ *Esquivel, et al. v. Southwestern Bell Mobile Systems, Inc.*, 920 F.Supp. 713, 716 (S.D.Tex. 1996) (Motion to remand class action to state court alleging that the liquidated damages provision governing early termination of service was punitive and invalid under Texas common law. Court granted the motion to remand stating that the case was not clearly preempted and "The congressional history indicates that 'terms and conditions' was meant to include such matters as customer billing information and practices and billing disputes, 'and other consumer protection matters.'")

⁶ *Brown v. Washington/Baltimore Cellular, Inc. et al.*, 109 F.Supp.2d 421, 423 (D. Maryland 2000) finding that class actions by wireless subscribers seeking to recover unlawful late fee charges were not preempted by § 332(c)(3)(A).

service agreements; provide both parties an opportunity for hearing; provide the Commission with fining authority; and shall be limited to the terms and conditions of wireless service.

MADE AND ENTERED at Lincoln, Nebraska, this 13th day of October, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Vice Chairman

ATTEST:

Executive Director